Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1997

JOE A. MACRI; LOUISE MACRI;
JOE F. MACRI; and ELEANOR MACRI,

Petitioners,

v.

KING COUNTY, a political
subdivision of the State of Washington,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Graham v. Connor,* 490 U.S. 386 (1989), require that the remedy of just compensation under the Taking Clause of the Fifth Amendment replace and preclude substantive due process claims under the Fourteenth Amendment based on arbitrary and capricious government interference with property?

2. If claims for relief based on arbitrary and capricious government action interfering with property may only be based on the Fifth Amendment's Takings Clause, is such a claim unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) until the property owner seeks compensation under available state procedures?

PARTIES TO THE PROCEEDING

The plaintiffs are Joe A. and Louise Macri, and Joe F. and Eleanor Macri. There are no parent companies or wholly owned subsidiaries. The defendant is King County, a political subdivision of the State of Washington.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals was initially issued on April 21, 1997, and is reported at *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997). That opinion was subsequently amended by order on September 17, 1997. Appendix (App.) E. The amended opinion is reported at 126 F.3d 1125, and is reproduced herein at App A.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on April 21, 1997. Thereafter, petitioners sought reconsideration and rehearing *en banc*. On September 17, 1997, the opinion was amended and the petition for reconsideration and the suggestion for rehearing *en banc* were rejected. App. E. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 1983 of Title 42 of the United States Code states in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The subject matter of this action is the denial by King County of a plat application for an 11 lot residential subdivision. In a separate "writ of review" lawsuit,[1] Judge Nancy Ann Holman of the King County Superior Court previously ruled that the County's denial was arbitrary and capricious. App. D at 5. As the remedy in the writ action, Judge Holman directed the County to approve the application.

The present action was filed subsequent to the writ action and seeks damages resulting from the unlawful denial of the subdivision. Damages are sought under 42 U.S.C. § 1983 for violation of the Macris' substantive due process rights on the grounds that the denial was arbitrary and capricious. App. A at 4. The Macris also pled a Fifth Amendment takings claim alleging that the denial failed to substantially advance a legitimate government interest. App. A at 7. *See generally Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 383-85 (1994).[2]

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[1] Pursuant to Wash. Rev. Code 58.17.180, the denial of the plat application was reviewed by King County Superior Court to determine whether the denial was unlawful or arbitrary and capricious. *See* App. D at 2.

[2] The Macris also pled a takings under the Washington state constitution. That state law matter was settled by the parties after the District Court declined to exercise supplemental jurisdiction. App. A at 4 n.4. The Macris are pursuing their federal substantive due process claim to secure damages provided by Congress in 42 U.S.C. §§ 1983 including attorney's fees incurred in state court proceedings required to have the wrongfully withheld plat application issued. *See Mindich Developers, Inc. v. Hunziker*, 622 F. Supp. 1513, 1517 (S.D.N.Y. 1985). The Macris recognize that their total damages under Section 1983 will be offset by the amount received in the settlement of the state inverse condemnation claim.

Factual Background

The Macris' property is approximately 3.1 acres and is located in unincorporated King County, about five miles east of the City of Kent, Washington. App. D at 3. The proposed 11 residential lots were to be located on a cul-de-sac (referred to as El Cove) with access to the cul-de-sac provided by 200th Avenue S.E., a neighborhood collector street. *Id.*

The County initially denied the plat application on the basis of an unwritten rule not allowing more than 100 residential lots to be serviced by a single access road. Because prior development further down 200th Avenue S.E. had already taken place, the Macris' proposed 11 lots would place the access road beyond the 100-lot limit. Their application was therefore denied. App. D at 2.

In the prior writ action, Judge Holman made a number of findings. Despite the unwritten rule regarding street access, Judge Holman found street access to be adequate.

> 4. Street Access. The 200th Ave. S.E. corridor provides adequate access to El Cove. Said corridor is identified by County Road Standards as a neighborhood collector designed to service over 50 single family dwelling units. This corridor has ample capacity to provide vehicular access to El Cove.

App. D at 3. Judge Holman also found the application complied with all other legal requirements.

> 7. Plat Complies with all Legal Standards. El Cove Plat complies with all applicable legal standards lawfully imposed by King County and/or the State of Washington. This court does not construe the face of the findings adopted by the King County Council to the contrary and finds no requisite support in the record to justify a factual finding that the El Cove Plat does not comply with all objective legal standards.

App. D at 4.

As to the specific unwritten rule that the County applied to the Macris, Judge Holman explained:

> 8. Rule of Thumb does not have Force of Law. The so-called 100 lot limit rule of thumb does not have the force of law nor has it been consistently applied.

App. D at 4. Judge Holman further elaborated that the 100 lot limit

> was no more than an informal unwritten "rule of thumb" not supported by ordinance, resolution, formally adopted policy, or comprehensive plan provision.

App. D at 4. She concluded that that the

> rule of thumb was arbitrarily and irrationally applied to justify denial of the El Cove subdivision. The rule of thumb was arbitrary and irrational on its face and as applied. Application of the rule of

> thumb to this project was in disregard of the facts and circumstances of this proposal.

App. D at 4.

King County did not appeal the decision of Judge Holman. Instead, the King County Council finally approved the Macris' application approximately four years after the plat application was submitted. *See* App. D at 3 (application filed in 1990).

Subsequently, this damages action was commenced in King County Superior Court. The action was removed to federal court by the County. The Honorable Thomas S. Zilly dismissed all claims on June 5, 1995. App. B.

The Ninth Circuit's Decision

On appeal to the Ninth Circuit, the Macris contended that the state trial court rulings rendered by Judge Holman should have been given collateral estoppel effect in the federal court. They argued that applying collateral estoppel necessarily results in a conclusion that denial of the plat was a violation of their substantive due process rights and/or a taking of property without just compensation. The Ninth Circuit did not address the collateral estoppel issues. *See generally* App. A.

The Ninth Circuit instead ruled that the Macris' substantive due process claim was subsumed into their takings claim. Relying on Ninth Circuit precedent in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) and this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), the Ninth Circuit abolished substantive due process claims in the land use and zoning context. App. A at 6-8.

The Ninth Circuit's reasoning focused in part on this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which reaffirmed that a taking occurs when a land use restriction does not "substantially advance legitimate state interests." *Id.* at 385.; *Macri*, App. A at 7. The Ninth Circuit recognized that if the Macris' could prove this allegation, the County's denial would constitute a taking. App. A at 7-8. However, in deciding that the Macris' substantive due process claim was subsumed into the Takings Clause, the Ninth Circuit did not discuss the impact of the divergent *legal standards* applied in takings claims as compared to substantive due process claims. *See Dolan*, 512 U.S. at 391 (distinguishing rational basis/arbitrary standard of due process and equal protection from the greater scrutiny applied in takings cases under the "substantially advance" test).

Similarly, the Ninth Circuit did not discuss or attempt to reconcile the constitutionally distinct *remedies* separating a takings claim from a substantive due process claim. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (invalidation is not the remedy for a taking; constitutionally mandated remedy is payment of just compensation); *Williamson County*, 473 U.S. at 194 (government taking of property is not unlawful; constitution merely requires payment of compensation).[3]

Nevertheless, the Ninth Circuit broadly held:

> Since the Takings Clause "provides an explicit source of constitutional protection"

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[3] While the **constitutional** remedy for a substantive due process violation is invalidation of the offending regulation as an unlawful exercise of the police power, Congress has determined that public policy supports providing constitutional violations with an additional **statutory** remedy for damages under 42 U.S.C. § 1983.

> against the challenged government conduct, substantive due process has no place in this context.

App. A at 8 (quoting *Armendariz*). In short, as long as there is a "just compensation" remedy for takings, the Ninth Circuit now holds that arbitrary and capricious government land use action can no longer be challenged (and thereby invalidated) on substantive due process grounds. The additional practical impact is to foreclose the remedy provided by 42 U.S.C. § 1983 for constitutional violations that would otherwise be available if the Macris can pursue and prevail on their substantive due process claim.

Having blocked the Macris' arbitrary and capricious substantive due process allegations, the Ninth Circuit next proceeded to dismiss the takings claim on ripeness grounds. The Ninth Circuit concluded that Washington has an adequate procedure for reimbursement for the taking of property and therefore concluded that dismissal on ripeness grounds was proper. App. A at 8.[4]

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[4] Similar to the federal constitution, the Washington state takings clause entitles one to a remedy of just compensation—fair market value of the property taken (or rental value for a temporary taking). However, the state remedy of just compensation is not the equivalent of the remedy of consequential damages and attorney fees provided by Congress under 42 U.S.C. sections 1983 and 1988 for a violation of substantive due process. *See Carey v. Piphus*, 434 U.S. 247, 262 (1978).

REASONS FOR GRANTING THE WRIT

I.

REVIEW SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT AND DIRECT CONFLICT BETWEEN THE CIRCUIT COURTS

Two distinct and conflicting views have developed regarding the application of *Graham v. Connor* in the land use context. On one hand, there is the view of the Ninth and Tenth Circuits that holds, as described above, if the government action is subject to challenge as a taking without just compensation, there can never be a substantive due process claim. *Macri*; App. A at 4-8. *See also Armendariz*, 75 F.3d 1311; *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

A directly contrary rule applies in the Sixth, Third, and District of Columbia Circuits. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1995); *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997).

Prior to the *Armendariz* and *Macri* cases, the Ninth Circuit recognized the viability of substantive due process claims even after *Graham v. Connor* was decided. In *Hoeck v. City of Portland*, 57 F.3d 781, 784-85 (9th Cir. 1995), the panel noted the *Graham* issue, and stated that at

> first blush, the substantive due process claim would appear to be precluded by a more specific claim based on the Takings Clause. However, in *Sinaloa Lake Owners*

> *Association v. City of Simi Valley*, 882 F.2d 1398, 1408-09 n.10 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), we held that *Graham* does **not** bar a companion substantive due process claim alleging that "the government has used its power in an abusive, irrational or malicious way." *Id.* at 1408-09 n. 10; *see also Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (finding that substantive due process claim is not subject to exhaustion requirement of taking claim).

Hoeck, 57 F.3d at 784-85 (emphasis added).

Subsequently, *Sinaloa Lake* was overruled by *Armendariz*. 75 F.3d at 1326. In so doing, the Ninth Circuit set forth its broad interpretation of *Graham*—that the Fourteenth Amendment is preempted by other provisions of the Constitution.

> We need not and do not address whether the City's conduct was rational. Even if the City's alleged conduct was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, (1926), the plaintiffs' substantive due process claim fails because it is preempted by other constitutional claims under the rule of *Graham v. Connor*.

Armendariz, 75 F.3d at 1318.

This Court was unfortunately not provided with an opportunity to review *Armendariz*.[5] Now, with the recent decision in *Macri*, and the similar decisions in *Patel* and *Sinclair Oil*, the Ninth Circuit approach is entrenched. As stated in *Sinclair Oil*:

> [I]n recent days we have expressly refuted the notion that substantive due process claims can apply where the government has allegedly effected a taking violative of the Fifth Amendment. *Armendariz v. Penman*, 75 F.3d 1322, 1325-26. In *Armendariz*, we explained that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Id.* Sinclair's substantive due process claim, therefore, no longer states a valid cause of action.

Sinclair Oil, 96 F.3d at 407.

The Tenth Circuit agrees with the Ninth Circuit and has jettisoned substantive due process protections of property entirely.

> Based on these authorities [*Graham* and *Whitley v. Albers*, 475 U.S. 312 (1986)], we conclude that Bateman's due process and equal protection claims are subsumed

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[5] The Westlaw case history in *Armendariz* does not include a reference to certiorari being denied, therefore, a petition apparently was not filed.

> within "the more particularized protections of the [Takings] Clause."

Bateman v. City of West Bountiful, 89 F.3d at 709 (quoting *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991)).

The approach by the Ninth and Tenth Circuit's is summarized by Justice Talmadge on the Washington Supreme Court.

> [F]ederal jurisprudence has virtually rejected the application of substantive due process to land use claims under 42 U.S.C. § 1983, requiring instead that such claims be based on a specific constitutional provision such as the takings clause of the Fifth Amendment. *Armendariz*, 75 F.3d 1318.

Sintra v. City of Seattle, 131 Wash.2d 640, 683, 935 P.2d 555 (1997) (Talmadge, J., concurring) (writing to separately state that the Takings Clause is the only constitutional protection one has in regard to property).

A **directly conflicting view** is taken by the Sixth Circuit.[6] In *Pearson v. City of Grand Blanc*, 756 F. Supp. 314 (E.D. Mich. 1991), a denial of a rezone request was challenged on substantive due process, equal protection and

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[6] One judge on the Supreme Court of Michigan has also rendered a contrary view on the subject, adding further to the conflict among the nation's courts. "I do not believe that the principles recently applied by the Court in *Graham* require us to employ a Fifth Amendment taking analysis to the exclusion of substantive due process theories in cases involving the regulation of land use." *Electro-Tech, Inc. v. H.F. Campbell Company*, 433 Mich. 57, 127, 445 N.W. 2d 61, 93 (1989) (Brickley, J., dissenting)(citations omitted).

takings grounds. In considering the impact of *Graham*, the District Court acknowledged:

> Although the Supreme Court has on occasion held that the specific constitutional protection supercedes the more generalized due process protection, it has not ruled on whether the specific takings clause of the Fifth Amendment supercedes the general due process provisions of the Fifth and Fourteenth Amendments.

Pearson, 756 F. Supp. at 317.

The District Court proceeded to hold that the "takings clause supercedes any substantive due process claim in claims arising from local land use disputes." *Id.*

The District Court, however, was overruled by the Court of Appeals on this issue. The Sixth Circuit stated:

> [T]he district court opinion ... adopts the rationale that all federal zoning cases should be treated as "takings." After exhaustive research, we find that this proposition ... cannot be reconciled with current controlling precedent. Our research further reveals **the circuits to be deeply divided** concerning the theories to be employed in federal court cases challenging zoning.

Pearson v. Grand Blanc, 961 F.2d 1211, 1213-14 (6th Cir. 1992) (emphasis added).

The Sixth Circuit reviewed the law from the various circuits and was struck by the lack of uniformity on substantive due process claims like the Macris' which allege arbitrary and capricious land use actions.

> The lack of uniformity among the circuits in dealing with zoning cases of the "arbitrary and capricious substantive due process" category is remarkable.

Id. at 1217.

> We wish it were within our power to harmonize these decisions, but the conflicts among the circuits are too great. Harmony will have to await action by the Supreme Court.

Id. at 1220 n. 45. Accordingly, the Sixth Circuit has directly rejected the interpretation of *Graham* that is now adopted by the Ninth Circuit in *Armendariz* and *Macri*.

Like the Sixth Circuit, the District of Columbia Circuit rejects the approach taken by the Ninth and Tenth Circuits. In *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997), the court explained:

> Alternatively, Tri County appears to be invoking the more nebulous branch of substantive due process .... There is some authority under which the very closeness of this claim to the taking argument might be a ground for rejecting it. ... But in this circuit at least, under *Silverman* [*v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988)], the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's'

> substantive protection of property rights from government imposition.

104 F.3d at 459. The District of Columbia Circuit was persuaded in part by Justice Souter's concurrence in *Albright v. Oliver*, 510 U.S. 266, 286-87 (1994), which noted that this Court has rejected the proposition that

> "the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure)."

Tri County Industries, 104 F.3d at 459 (quoting *Albright*, 510 U.S. at 286-87 (Souter, J., concurring)).

The Third Circuit also continues to recognize the viability of substantive due process claims in the land use context. *DeBlasio*, 53 F.3d 592.

> This case raises important questions regarding the extent to which the due process clause of the Fourteenth Amendment may serve to protect landowners against arbitrary governmental regulation of land use. We conclude that in the context of land use regulation, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Id. at 593. This conclusion of the Third Circuit is directly contrary to the Ninth Circuit's conclusion in the case at bar.

The importance of this issue was recognized by the Third Circuit in *DeBlasio*.

> We think it consistent with *Bello* [*v. Walker*, 840 F.2d 1124 (3rd Cir. 1988)] to conclude that ownership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a landowning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

DeBlasio, 53 F.3d at 600-01.

Resolving this significant conflict among the circuits is necessary for orderly development of precedent, as well as to preserve constitutional rights. The divisions between the circuits are well defined and entrenched. Without guidance from this Court, the constitutional protections and remedies afforded a property owner will vary widely based on what region of the country a person lives. Certainly, whether one can rely on the substantive due process protection of the Fourteenth Amendment should not depend upon geography. This Court should grant this petition and harmonize the currently discordant circuits.

II

BY ASSUMING THAT DUE PROCESS AND TAKINGS CLAIMS ARE FUNGIBLE, THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION THAT CONFLICTS WITH THIS COURT'S JURISPRUDENCE

Two independent and very different constitutional protections are at issue in this case. The Takings Clause provides one explicit source of constitutional protection of property. It limits government power by requiring that, when government takes private property, just compensation be paid. *First English*, 482 U.S. at 315 (Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"). If a taking occurs, the remedy is not invalidation of the action, but rather the constitutionally mandated remedy is payment of compensation. *Id.* As this Court made clear in *Williamson County*, "[t]he Fifth Amendment does not proscribe the taking of property, it proscribes taking without compensation." 473 U.S. at 194.

The substantive protection of the Due Process Clause is another explicit source of constitutional protection of property. However, this Court has consistently held that it protects citizens from a completely different kind of wrong—actions which are "unreasonable, arbitrary or capricious." *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 84-85 (1980). It limits government power by requiring that exercise of the police power not be arbitrary and capricious but instead be rationally related to legitimate purposes. In contrast to the takings "just compensation" remedy, a regulation that is arbitrary and capricious is remedied by invalidating the offending exercise of the police power.

Professor Krotoszynski recognized the important distinctions between takings and substantive due process protections when he wrote:

> [S]ubstantive due process claims are not interchangeable with Takings Clause claims. ... The *Armendariz* court failed to appreciate the gravamen of a substantive due process action for the arbitrary deprivation of property. It is not the loss of property that justifies the claim, but rather the arbitrary and irrational nature of the government's action. ... The Takings Clause does not address itself to irrational government action; to the contrary, its text speaks to occasions of presumptively rational government behavior: the taking of private property for a public purpose.

Ronald J. Krotoszynshi, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 571-72 (1997).

These distinct purposes and remedies also employ significantly divergent legal standards to be applied to each provision. Significantly, this Court's precedents have explained that the rational basis/arbitrary and capricious test of due process is more deferential than the test utilized in takings claims under the "substantially advance legitimate state interests" standard.

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the

> "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." Justice Brennan relies principally on an equal protection case and two substantive due process cases in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical.

Nollan, 483 U.S. at 834 n.3 (citations omitted; emphasis in original).[7] One of the bases for increased scrutiny in takings claims is that "in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. Heightened scrutiny allows a court to determine whether a putative regulatory action masks a taking. *Dolan*, 512 U.S. at 385 ("the government may not require a person to give up a constitutional right—here the right to receive compensation when property is taken for a public use—in exchange for a discretionary benefit"); *see also id.* at 389 ("we think this

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[7] The increased scrutiny applicable under the Takings Clause was reaffirmed in *Dolan*.

> [T]he term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. *Dolan*, 512 U.S. at 391.

standard [rational basis] is too lax to adequately protect petitioner's right to just compensation").

The greater deference afforded under the substantive due process test is also consistent with the drastic remedy applied in the due process context. The invalidation remedy stops government from engaging in the challenged action. When government desires to act in a certain manner, but is potentially stopped from doing so by a court, it is appropriate that the court afford government the greatest deference to accomplish its legitimate objectives. Only where government acts in an arbitrary and capricious manner will the action be struck down.

In contrast, the result of a successful taking claim is not invalidation of the government action. Rather, the government may continue to enforce the regulation or engage in the activity. The government simply pays compensation for the taking that results from its activity, but the activity or regulation may go on.

Despite these significant distinctions in the purposes, remedies, legal standards, and allocation of the burden of proof, [8] the Ninth Circuit nevertheless concludes that because a government action may be challenged as a taking, a substantive due process claim cannot be maintained. The Ninth Circuit position is inconsistent with this Court's precedent upholding these distinct purposes, protections and legal standards employed under the two constitutional provisions.

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[8] In a similar manner, the burden of proof is different in takings claims as compared to a substantive due process challenge. *Dolan*, 512 U.S. at 391 n.8 (citing *Nollan*, 483 U.S. at 836).

The issue was directly addressed recently in the Urban Lawyer in an article by Thomas Roberts, Professor of Law at Wake Forest University. Professor Roberts explains some of the inherent problems with the current Ninth Circuit precedent under *Armendariz*. Of course, with the more recent *Macri* decision, these problems have become more entrenched and in need of this Court's review.

> The difficulty with these Ninth Circuit decisions [*Armendariz* and *Patel*] is that they do not make it clear that only some substantive due process claims are duplicates of taking claims, and only those should be subsumed. Substantive due process claims fall into two categories: (1) that the action taken by the state serves no legitimate public purpose, or has been accomplished in an irrational manner, or (2) that despite the existence of a legitimate end and a rational means, the effect is unduly onerous on the affected property owner. The former claim does not depend in any fashion on the economic impact. It does not duplicate what the Fifth Amendment does, and it ought not be preempted under the *Whitley-Graham* rule. Failure to separate the two types of substantive due process claims may result in some due process claims being preempted that ought not be. If the state prohibits redheaded persons from living in certain zones, the action may be arbitrary, but it does not constitute a taking. Likewise, if a state prohibits persons who are related by blood, marriage, or adoption from sharing living quarters, the action may violate substantive due process. The

> complainants deserve injunctive relief, and possibly damages, but they should not be relegated to a taking claim, where the only relief is compensation."

Thomas E. Roberts, Takings, Due Process, and Preemption, 29 THE URBAN LAWYER No. 3, 399, 407-08 (1997).

Prof. Roberts further correctly explained that the Ninth Circuit's venture into these waters, which includes overruling its own prior decision in *Sinaloa Lakes Owners Association*, is headed in the wrong course.

> In *Armendariz*, the Ninth Circuit said that on the basis of *Whitley* and *Graham*, the *Sinaloa* substantive due process claim should be dismissed. But should it? If the state drained a lake to create an area of wetlands elsewhere that was necessitated by the construction of a public project, it is likely a taking would be found. ... But, if the state drained the lake for no legitimate reason, as claimed in *Sinaloa*, the action could not be a taking for which compensation would be due, since the action would lack a valid public purpose. Rightful exercise of the police power that goes too far is a regulatory taking, but a wrongful exercise of the police power is a violation of substantive due process.

Roberts at 408-09.

In summary, the proper analysis should look first to whether there is a substantive due process violation under the arbitrary and capricious standard. If that claim is proven, the offending regulation must be invalidated and the claimant

may recover damages pursuant to 42 U.S.C. § 1983. If the substantive due process claim is not successful, a court should then proceed to the takings claim. If a taking is found under any of the various tests for a taking, including a taking based on failure of the government regulation to substantially advance a legitimate state interest, compensation must follow. A court may not invalidate or repeal the taking. That choice must be left for the government agency. *First English*, 472 U.S. at 317 (government may choose to repeal its action and convert the taking into a temporary one).

Significantly, the Ninth Circuit in the case at bar failed to recognize that the Macris' substantive due process claim is based on allegations of an arbitrary and capricious government action. If successful, the Macris' remedy is invalidation of the government action and whatever damages are due under 42 U.S.C. § 1983. While the Macris have already secured invalidation of the government action through their successful state court writ action, they are nevertheless entitled to pursue their additional statutory remedies provided by Congress for constitutional violations.

The Ninth Circuit, however, wrongfully concluded that the Fourteenth Amendment no longer protects individuals' interests in their property.

III

THIS COURT SHOULD DETERMINE WHETHER *GRAHAM* CAUSES THE TAKINGS CLAUSE TO REPLACE SUBSTANTIVE DUE PROCESS PROTECTION FROM ARBITRARY AND CAPRICIOUS GOVERNMENT ACTION

In *Graham* this Court held:

> all claims that law enforcement officers have used excessive force ... [in a "seizure"] should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

Graham, 490 U.S. at 395.

This Court has already recognized the limited impact of *Graham* in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993):

> We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another. As explained in *Soldal v. Cook County*, 506 U.S. [56] (1992): "Certain wrongs affect more than a single right and,

> accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."

James Daniel Good, 510 U.S. at 49-50.

More recently, in *United States v. Lanier*, __ U.S. __, 117 S.Ct. 1219, 1228 n.7 (1997), this Court explained that *Graham* does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments. Rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

This Court should now address whether the Takings Clause is an explicit source of constitutional protection that operates to exclude substantive due process claims in the land use context. The Ninth and Tenth Circuits so hold. The Sixth, Third, and District of Columbia Circuits do not. A decision from this Court is necessary to reconcile not only the conflicts among the circuit courts, but also to determine the continuing precedential value of this Court's substantive due process precedent in the land use context. This Court has often reaffirmed the right to substantive due process, stating that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). More specifically, the right to substantive due process in land use cases has previously been well recognized. *Village of*

Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 263 (1977); *State of Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (giving private parties control over government permit). Only this Court can provide the guidance now required to reconcile the conflicts of law and to clarify the relation between the Takings Clause claims and substantive due process.

There are many instances in the land use context where substantive due process, not takings, should be the appropriate constitutional challenge. Such cases include those where a permit is denied for partisan political or personal reasons unrelated to the permit (*Bello*, 840 F.2d 1124), or if there is a refusal to follow the law for no reason (*Southern Co-op Development Fund v. Diggers*, 696 F.2d 1347 (11th Cir. 1983)), or faking a water shortage to keep outsiders out (*Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990)), or revoking a permit in retaliation for successfully seeking judicial review (*Carr v. Town of Dewey*, 730 F. Supp. 591 (D.Del. 1990)). If eliminated, these and other instances of arbitrary regulatory action will be allowed to continue, subject only to the payment of just compensation. If that is to be the law, it should come from this Court.

IV.

IF SUBSTANTIVE DUE PROCESS NO LONGER APPLIES TO PROPERTY, THIS COURT SHOULD DETERMINE WHETHER *WILLIAMSON COUNTY* RIPENESS REQUIREMENTS APPLY

After dismissing the Macris' substantive due process claim, the Ninth Circuit next determined that the Macris' takings claim was not ripe. App. A at 8 (citing *Williamson County*).

One of the practical impacts resulting from the Ninth Circuit's ruling is that in all land use cases, the stringent ripeness requirements for takings claims would be imposed. As recognized by the Sixth Circuit in *Pearson*:

> By holding that the taking theory subsumes all other theories in zoning cases, the trial court in the instant case would impose these stringent ripeness requirements on all zoning cases.

Pearson, 961 F.2d at 1215. The problem with imposing these ripeness requirements is that the *Williamson County* state compensation remedy requirement makes no sense in the context of an arbitrary and capricious claim where the remedy should be invalidation of the offending regulation. Indeed, the Ninth Circuit is internally in conflict on this issue. In *Sinclair Oil*, directly conflicting with the decision in *Macri*, the panel held:

> [W]hile the just compensation ripeness requirement does not apply to "legitimate state interest" facial taking claims, it does apply to claims premised upon the denial of a property's economically viable use. Therefore, the federal facial taking claim contained in count three of Sinclair's complaint is not ripe, because it contends that the Plan stripped More Mesa of its economically viable use. On the other hand, the federal facial taking claim embodied in count four of Sinclair's complaint is ripe, as it asserts that the Plan

> does not substantially advance a legitimate state interest.

Sinclair Oil, 96 F.3d at 407. If the Ninth Circuit's view of *Graham* is to be upheld, this Court should then resolve the conflict regarding the correct application of the *Williamson County* ripeness requirements to a claim based on failure to substantially advance a legitimate state interest.

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CONCLUSION

As the Sixth Circuit stated in 1992, there is a need for this Court to harmonize the conflict among the circuits. The discord has not resolved itself, but rather become more intense and more confusing.

While nuances of constitutional law may vary among the circuits, the present state of the law is a resounding clash. Only this Court can ensure that the right to be free from arbitrary and capricious government action is not replaced with the right to be paid only the just compensation remedy for enduring the unconstitutional action.

DATED: December 16, 1997

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI; AND ELEANOR MACRI,

Plaintiffs-Appellants

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Appellee.

No. 95-35709
D.C. No.
CV 94-305-TSZ

OPINION

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted August 9, 1996.

Decided April 21, 1997.
As Amended on Denial of Rehearing and Rehearing
En Banc September 17, 1997.

Appeal from the United States District Court for the Western District of Washington, Thomas S. Zilly, District Judge, Presiding. D.C. CV 94-305-TSZ.

Before: BEEZER and O'SCANNLAIN, Circuit Judges, and BROWNING, District Judge. [1]

[1] The Honorable William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

WILLIAM D. BROWNING, District Judge:

I

Appellants' preliminary plat application was denied by Appellee ("the County"). A Washington state superior court ruled that the denial was wrongful and a preliminary application was granted. Appellants then filed this action in state court, alleging civil rights violations under 42 U.S.C. § 1983, a federal takings violation, and various state law violations. The County removed the action to federal court. The district court dismissed all federal claims and two of the state claims, and remanded the state inverse condemnation claim to state court. Appellants appeal the judgment dismissing the claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

II

In March 1990, Appellants filed an application with King County to subdivide their 3.1 acre property located on a dead end road in King County into 11 lots. After two hearings, the Hearing Examiner recommended that the application be denied because of inadequate access. The Hearing Examiner considered basing the decision on an informal "rule of thumb" often followed by the County that generally limited the number of lots which could be developed in an area with only one access road (the "100-lot" limit). However, the Hearing Examiner explicitly rejected the rule of thumb as a basis for his ruling because of its informal nature and instead relied upon a county ordinance allowing denial of an application if provision is not made for "the public health, safety, and welfare." Wash. Rev.Code § 58.17.110. The County Council adopted the Hearing Examiner's recommendation and denied the application on January 27, 1992. Appellants brought a writ of certiorari in

King County Superior Court to review the denial. On January 7, 1994, the superior court judge found the County's action "arbitrary and capricious," among other things, and ordered the County to approve the application. The superior court based its decision in part on its belief that the Hearing Examiner's decision was based on the informal rule of thumb and that the rule of thumb was arbitrary on its face and as applied. Also, the superior court found a lack of nexus between Appellants' proposed subdivision and the "alleged [access] problem." Finally, despite the fact that the complaint sought only review of the County Council's action, the superior court also heard arguments on constitutional issues. The court concluded that Appellants' substantive due process rights had been violated, and that the County's action had resulted in a taking without compensation in violation of the Fifth Amendment. Pursuant to the superior court's order, the County granted preliminary approval for the plat on February 28, 1994.[2]

Appellants brought this action against King County in the King County superior court on February 4, 1994. They claimed statutory damages for arbitrary agency action under Wah. Rev.Code Ch. 64.40, damages for inverse condemnation under the Washington Constitution, and civil rights violations under 42 U.S.C. § 1983, including violations of their substantive due process rights and a taking of property without just compensation contrary to the Fifth and Fourteenth Amendments.[3] King County removed to the federal district court. The district court dismissed all of the

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[2] As of February 21, 1995, a year after they achieved preliminary approval, Appellants had done nothing further to obtain final approval of their plat application.

[3] Appellants also brought a state claim for interference with economic expectancy, but the district court dismissed that claim with prejudice on the grounds of quasi-judicial immunity. Appellants do not appeal this ruling.

federal claims through a series of summary judgments; the district court dismissed the takings claim on the ground that it was not ripe and dismissed the substantive due process claims on the ground that Appellants did not, as a matter of law, demonstrate a violation of their due process rights. The district court also dismissed the state statutory damages claim on limitations grounds, and, declining to exercise supplemental jurisdiction, remanded the remaining state inverse condemnation claim to state court.[4] This appeal followed.

III.

[1] We review the district court's grant of summary judgment de novo. *Sederquist v. City of Tiburon*, 765 F.2d 756, 759 (9th Cir. 1984). The dismissal of the federal takings claim due to ripeness and the dismissal of the state claim based on statute of limitations are reviewed de novo. *Dodd v. Hood River County*, 59 F.3d 852, 857 (9th Cir. 1995); *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993).

IV.

Appellants' claims invoked the substantive protections of the Fourteenth Amendment's Due Process Clause ("nor shall any State deprive any person of life, liberty, or property, without due process of law") and the protections of the Fifth Amendment's Takings Clause ("nor shall private property be taken for public use, without just compensation"). At the time Appellants filed this action, we had recognized the existence of both claims on similar facts. *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989) (as amended), overruled by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).

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[4] The state inverse condemnation claim was subsequently settled by the parties in state court.

Subsequent to the district court's decision, however, this Court, in an en banc opinion, held that when an explicit textual provision of the Constitution protects against the challenged government action, the claim must be analyzed under that specific provision alone and not under the more general guarantee of substantive due process. *Armendariz*, 75 F.3d at 1325-26. Relying on the Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), which held that all claims of excessive force must be brought under the Fourth Amendment's excessive force clause and not under the more general substantive due process analysis, we held that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Armendariz*, 75 F.3d at 1325-26.[5]

In *Armendariz*, the plaintiffs alleged that the City performed inspections and over enforced the housing code, eventually causing plaintiffs to lose their property through foreclosure, so that the land could be developed for private gain. We held that "[b]ecause the ... Fifth Amendment[ ] provide[s] explicit limitations on the type of conduct challenged by plaintiffs, Graham dictates that [the Fifth Amendment], not the Fourteenth Amendment's guarantee of substantive due process, should guide the analysis of the plaintiff's claim." *Id.* at 1320. Although the plaintiffs did not bring a takings claim, we held that this aspect of their claim was that of a private taking, i.e., the taking of private property for private use. *Id.* at 1321. The greater part of the opinion is spent in analyzing whether the Fifth Amendment's Takings Clause provides a remedy for private takings. We

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[5] Our decision in *Armendariz* has been affirmed by a three judge panel on facts virtually indistinct from the facts presented in *Armendariz*. *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996).

determined that "the Takings Clause 'provides an explicit textual source of constitutional protection' against 'private takings,'" *id.* at 1324 (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989)), and thus that plaintiffs' substantive due process claim would not stand. *Id.*

The basis for our decision in *Armendariz* was the belief that the substantive due process clause must be expanded only with the greatest care and that its protection is primarily reserved for "liberties 'deeply rooted in this Nation's history and tradition.'" *Id.* at 1319 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977)). We noted the Supreme Court's move away from extending substantive due process protection to purely economic interests, *see Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), when the Supreme Court, in "invalidating economic legislation, engaged in a level of judicial activism which was unprecedented in its time and unmatched since." *Armendariz*, 75 F.3d at 1318. Thus, we announced an "exception to the general rule [that a plaintiff can seek relief under multiple constitutional theories], recognized out of a well-placed reluctance to expand the concept of substantive due process. ... The scope of substantive due process does not extend to areas addressed by other, more specific provisions of the Constitution." *Id.* at 1326.

[2][3] A second concern we addressed in *Armendariz*, which was also a concern for Appellants in this case, was a loophole in takings law regarding the ripeness doctrine. Namely, by presenting essentially a takings claim under the claim of substantive due process, plaintiffs were able to avoid the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L. Ed. 2d 126 (1985). It is axiomatic that a takings violation is not complete until the plaintiff has

sought compensation through state remedies and been denied, whereas a substantive due process violation is complete as soon as the government action occurs.

[4] Appellants' complaint alleges that King County violated their right to due process and took their property without just compensation contrary to the Fourteenth and Fifth Amendments. Specifically, their complaint alleges and their brief argues that King County effected a taking by denying their plat application without substantially advancing a legitimate public purpose and under circumstances denying them any beneficial use of the property. At oral argument, appellants attempted to distinguish *Armendariz* by classifying their claim solely as a due process violation and not as a takings violation at all. They argued that when government action fails substantially to advance a legitimate government purpose, the claim should lie under the Due Process Clause regardless of whether the action involves real property rights. Appellants, however, cannot sidestep *Armendariz* by re-characterizing their claim as lying solely in substantive due process.

The Supreme Court has repeatedly recognized that a land use restriction that does not "substantially advance legitimate state interests" or "denies an owner economically viable use of his land" effects a taking. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Nollan v. California Coastal Comm'n* 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 383-85, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994). In *Dolan*, the Supreme Court reaffirmed that the Fifth Amendment's Takings Clause applies to the states through the Fourteenth Amendment, rejecting the suggestion that the case was actually grounded in substantive due process. If Appellants can prove that King County denied their plat application without advancing a legitimate state interest or under

circumstances denying them any economically viable use of their property, King County's actions would constitute a taking.

Since the Takings Clause "provides an explicit source of constitutional protection" against the challenged governmental conduct, substantive due process has no place in this context. *Armendariz*, 75 F.3d at 1325; *see Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996).

V.

The district court dismissed Appellants' federal takings claim as unripe. Appellants argue that the dismissal on ripeness grounds was improper and that the district court should have remanded the federal takings claim to the state court along with the state inverse condemnation claim.

[5][6] The Fifth Amendment is not offended by the government taking property, but only by the government taking property without just compensation. Thus, a Fifth Amendment takings claim is not ripe until the plaintiff has been denied compensation by the state. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 97 L.Ed.2d 126 (1985). If a state has an adequate procedure for compensation, until this procedure has been exhausted and the plaintiff denied compensation, no taking has occurred. *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1402. Washington has an adequate procedure for reimbursement for the taking of property. *Guimont v. Clarke*, 121 Wash.2d 586, 594, 854 P.2d 1, 5-6 (1993). Therefore, dismissal of Appellants' claim on ripeness grounds was proper. *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988).

The district court also properly remanded the remaining state inverse condemnation claim to state court.

Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction. The district court had dismissed all federal and constitutional claims, and did not abuse its discretion in remanding the state claim to state court.

[7] Appellants argue that their federal takings claim should have been remanded along with the state inverse condemnation claim because, unless the federal claim is considered in state court, Appellants will be precluded from bringing the federal claim on the basis of res judicata. In support of this argument, Appellants cite cases in which the federal court applied principles of res judicata to dismiss a federal claim after the state court had given full and fair consideration to both the federal and the state claims. *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-28 (3rd Cir. 1989).[6] However, we have expressly held that the failure of a plaintiff to raise a federal takings claim in state court does not preclude that plaintiff from bringing a subsequent federal takings claim in federal court. *Dodd v. Hood River County*, 59 F.3d 852, 859-60 (9th Cir. 1995).[7] Therefore, the district court properly dismissed the federal takings claim.

VI

Finally, Appellants contend that the district court erred in dismissing their claims under Wash. Rev.Code §

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[6] Appellants also cite *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993). *Mission Oaks*, however, dealt only with *Younger* abstention and is inapposite for our purposes.

[7] *Dodd* also clearly holds that a court can reserve a federal issue so that the issue will not be precluded from further litigation, despite Appellants' assertion that their federal claim will necessarily be precluded by res judicata. *Dodd*, 59 F.3d at 862.

64.40.020 as untimely.

Wash.Rev.Code § 64.40.030 provides:

> Any action to assert claims under the provisions of this chapter shall be commenced only within thirty days after all administrative remedies have been exhausted.

[8][9] The County Council adopted Ordinance 10252 denying Appellants' plat application on January 27, 1992. Appellants did not file their claim for damages under Wash. Rev.Code Ch. 64.40 until February 4, 1994, more than two years after the final determination by the County Council. However, while the Council's action would have been the final administrative remedy if Appellants had done nothing, Appellants brought an action in King County Superior Court on February 26, 1992, specifically for the purpose of overturning what Appellants claimed was arbitrary and capricious action by the Council. The superior court ruled in Appellants' favor on January 7, 1994, and ordered the County to approve the application. Appellants are correct that, under these facts, their administrative remedies were not exhausted until February 28, 1994, when, pursuant to the superior court's order on Appellant's writ of certiorari, the County Council finally approved the preliminary plat application. *See Hayes v. City of Seattle*, 934 P.2d 1179, 1183-84 (1997). However, Appellants filed their claim for damages under Wash.Rev.Code Ch. 64.40 on February 4, 1994, more than three weeks before the County Council finally approved the preliminary plat application. Appellants claim was therefore unripe under the plain language of § 64.40.030, which explicitly states that actions must be "commenced only within thirty days after all administrative remedies have been exhausted." Wash.Rev.Code § 64.40.030 (emphasis added). This conclusion is supported

by the decision of the Washington Supreme Court in *Hayes*, which noted that "final action on [applicant's] request for a permit did not occur until the City Council ultimately approved his application [following judicial review of the Council's initial determination]. ..." *Hayes*, 934 P.2d at 1184. Consequently, Appellants' claim under Ch. 64.40 was properly dismissed by the district court as untimely, not for the reason that it exceeded the limitations period, however, but because it was unripe.

VII

We accordingly affirm the district court's dismissal of Appellants' substantive due process claim based on *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), which held that a more general substantive due process claim cannot be brought if the claim is based on governmental conduct which implicates an enumerated constitutional right.

Further, we affirm the district court's grant of King County's cross motion for summary judgment on the federal takings claim on ripeness grounds. Likewise, we affirm the district court's grant of King County's motion to dismiss on the state statutory damages claim for the reason that Appellants' claim was untimely.

AFFIRMED.

APPENDIX B

UNITED STATES |DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI; AND ELEANOR MACRI,

No. C94-305Z

Plaintiffs-Appellants

ORDER
(Filed
June 5, 1995)

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Appellee.

_____/

THIS MATTER comes before the Court on Plaintiffs' motions for summary judgment, docket nos. 47 & 48, and Defendant's cross- motions for summary judgment, docket nos. 58 & 60. On May 25, 1995, the Court heard oral argument from the parties with regard to these motions. At that time, the Court issued the following oral rulings:

(1) the Court denied Plaintiffs' motion to amend their complaint to include a federal equal protection claim;

(2) the Court held that collateral estoppel does not apply and that Plaintiffs' attorneys fees request pursuant to RCW 8.25.075 is premature; and

(3) the Court requested additional briefing on the issue of quasi-judicial immunity with respect to Plaintiffs' claim of intentional interference with business expectancy.

See Minutes (docket no. 94). The due date for further briefing has passed, and the Court has received no response from Plaintiffs regarding Defendant's argument that it has immunity from actions that sound in ordinary tort. See Lutheran Day Care v. Snohomish County, 119 Wn. 2d 91, 125-27, 829 P.2d 746 (1992), cert. denied, 113 S. Ct. 1044, 122 L. Ed. 2d 353 (1993). The Court treats Plaintiffs' failure to respond as an admission that opposition would be without merit. Local Rule CR 7(b)(4).

Having considered the oral arguments of the parties, and having reviewed all papers filed in support, and in opposition to, each motion for summary judgment, the Court hereby ORDERS:

(1) Plaintiffs' motion for summary judgment on due process, docket no. 47, is DENIED;

(2) Defendant's cross-motion for summary judgment on due process, docket no. 60, is GRANTED;

(a) Plaintiffs' due process claim, brought under 42 U.S.C. § 1983, is DISMISSED;

(b) Plaintiffs' claim for intentional interference with business expectancy is DISMISSED with prejudice on grounds of quasi-judicial immunity;

(3) Plaintiffs' motion for summary judgment on inverse condemnation or taking, docket no. 48, is DENIED;

(4) Defendant's cross-motion for summary judgment on takings and inverse condemnation, docket no. 58, is GRANTED in part, and DENIED in part;

(a) Plaintiffs' federal takings claim, also brought under 42 U.S.C. § 1983, is DISMISSED as not ripe for review;

(b) The Court declines to exercise supplemental jurisdiction over Plaintiffs' state inverse condemnation claim;

(5) This case is REMANDED to state court for further proceedings.

BACKGROUND

The material facts in this case are not in dispute. Plaintiffs own 3.1 acres of property located about five miles east of the city of Kent in King County. Exhibit 3, at 1, 4, Affidavit of H. Kevin Wright (docket no. 56) [hereinafter "Wright Affidavit"]. On March 27, 1990, Plaintiffs submitted to the County an application for a preliminary plat approval. The application complied with all zoning and lawfully adopted ordinances. Plaintiffs proposed to subdivide their property into 11 lots to be known collectively as the "El Cove" plat. Access to the proposed plat was to be provided from S.E. 272nd Street (the Kent-Kangley Road) along the 200th Avenue S.E. corridor. The 200th Avenue S.E. corridor was classified by the County as a "neighborhood collector" road, which by County ordinance may serve over

50 single family dwelling lots. Transcript, at 86, Exhibit 11 to Declaration of Joseph Macri (docket no. 49) [hereinafter "Macri Declaration"]. The King County road standards existing during the period at issue did not limit the maximum number of lots which could be served by a neighborhood collector. King County, however, had an unwritten and long standing policy of limiting to 100 the number of lots that could be developed using a single access.

In May 1991, after reviewing the King County Building and Land Development Division's report, the King County Zoning and Subdivision Examiner recommended to the King County Council that Plaintiffs' proposed plat be denied based on an unwritten policy of "not allowing more than 100 lots to be served from a single access street." Exhibit 5, at 1, Macri Declaration; see Exhibit 6 (Examiner's Report and Recommendation), Macri Declaration. Although the Examiner concluded that Plaintiffs' 11 additional lots "would not be significant," Finding No. 10, Exhibit 6 to Macri Declaration, the Examiner recommended denying Plaintiffs' plat "[u]ntil such time as an additional neighborhood collector street is available," Conclusion No. 1, Exhibit 6 to Macri Declaration.

Plaintiffs timely appealed to the King County Council. The Council expressed concerns about relying upon an unwritten policy to deny a plat and remanded the proposed El Cove plat to the Zoning and Subdivision Examiner for further consideration. The Examiner's second hearing concerned the appropriateness of the "100-lot limit." The Examiner found that the "100-lot limit" was the County's "practice," but that it had not been adopted by ordinance. Finding Nos. 2 & 8, Exhibit 4 to Macri Declaration. The Examiner concluded, "[i]n view of the absence of an adopted regulation ..., King County cannot apply [the 100-lot limit], or any other, specific limit automatically, either as a matter of subdivision regulation or environmental protection." Finding

No. 8, Exhibit 4 to Macri Declaration. The Examiner further concluded:

> The proposed plat of El Cove should not receive preliminary approval unless and until appropriate provision is made for adequate traffic circulation by the establishment and construction of a second access to the County arterial road system.

Conclusion No. 3, Exhibit 4 to Macri Declaration. The Examiner recommended, if Plaintiffs would agree to a deferral, a remand of the application to the Building and Land Development Division for further consideration "at such time as an adequate traffic circulation pattern is established, which will provide a second access route to the arterial road system." Exhibit 4, at 7, Macri Declaration. If Plaintiffs would not agree to a deferral, the Examiner recommended denial of the application. Id.

Plaintiffs appealed again to the King County Council. Plaintiffs would not consent to deferral and the Council denied the proposed plat of El Cove. Plaintiffs timely appealed to Superior Court through a Writ of Review. By Order on Review dated January 7, 1994, Judge Nancy Ann Holman ordered King County to approve Plaintiffs' preliminary plat application. Exhibit 2, at 6, Macri Declaration. Thereafter, King County enacted Ordinance 10435 § 1, imposing a "100-lot limit" on future plat applications. The validity of that ordinance is not at issue here. On February 28, 1994, the King County Council granted Plaintiffs' preliminary approval for the El Cove plat. Exhibit 11, Wright Affidavit. Since receiving preliminary approval, Plaintiffs have taken no steps to obtain final approval of the subdivision. Deposition of Joseph Macri, at 44, 48-49, Exhibit 1 to Declaration of Cassandra Newell (docket no. 59).

Plaintiffs commenced this action for damages in state court, claiming intentional interference with business expectancy, and suing under RCW 64.40.020 for arbitrary agency action,[1] and under 42 U.S.C. § 1983[2] for violation of their civil rights under the due process and just compensation clauses of the Fifth Amendment, as applied to the states under the Fourteenth Amendment. Plaintiffs also sue under Article I, § 16 of the Washington Constitution for inverse condemnation.[3] Plaintiffs seek damages for the County's delay in approving the El Cove plat during the period from March 27, 1990 to February 28, 1994. Defendant removed the action to this Court pursuant to 28 U.S.C. § 1441 (a) - (c). Plaintiffs have now moved for summary judgment on all claims.

ANALYSIS

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[1] By Minute Order dated July 29, 1994, the Court dismissed Plaintiffs' claim under RCW 64.40.020 for failure to comply with the applicable statute of limitations. Minute Order (docket no. 26).

[2] 42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[3] Plaintiffs contend that Article I, § 16 of the Washington Constitution affords greater protection than the just compensation provisions of the United States Constitution. As Defendant correctly indicates, Plaintiffs have not briefed the Gunwall factors necessary for the Court to perform an independent state constitutional analysis. See State v. Gunwall, 106 Wn. 2d 54, 720 P.2d 808 (1986); see also Guimont v. City of Seattle, 77 Wn. App. 74, 79 n.4, _____ P.2d _____ (1995). As the Court does not reach the merits of Plaintiffs' state law takings claim, the Court has not sought further briefing on the Gunwall analysis.

A. The Summary Judgment Standard

Summary judgment is proper only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing an absence of genuine factual issues. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574, reh'g denied, 909 F.2d 375 (9th Cir. 1990). The Court should assume the truth of evidence proffered by the party opposing summary judgment and draw all reasonable inferences in the light most favorable to the nonmovant. Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991).

B. Substantive Due Process

"[T]he due process clause includes a substantive component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990). Plaintiffs here do not challenge the adequacy of the County's procedures in denying their preliminary plat application; rather, Plaintiffs allege a violation of their substantive due process rights. The protection from government action provided by substantive due process has traditionally been reserved for the vindication of fundamental rights involving matters of marriage, family, procreation and the right to bodily integrity. Albright v. Oliver, _____ U.S. _____, 114 S. Ct. 807, 812, 127 L. Ed. 2d 114, 122 (1994). When a plaintiff relies on substantive due process to challenge governmental action that does not involve a fundamental right, the courts "do not require that the government's action actually advance its stated purposes, but merely look to see whether the

government could have had a legitimate reason for acting as it did." Halverson v. Skagit County, 42 F.3d 1257, 1262 (9th Cir. 1994). Unlike in a takings case, in which the Court must balance the public interest against the severity of the private deprivation, in a substantive due process case, the Court need only evaluate the rationality of the government action, without regard to its impact. Id.; see also Sinaloa Lake, 882 F.2d at 1407 ("To establish a violation of substantive due process, the plaintiffs must prove that the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926))).

Here, the County had a legitimate reason for denying Plaintiffs' preliminary plat application. Washington law provides that a subdivision may not be approved unless it makes appropriate provisions for "the public health, safety, and general welfare." RCW 58.17.110. The King County Code requires that a proposed subdivision "and its ultimate use be in the best interests of the public welfare and the neighborhood development of the area." KCC 19.08.050. In this case, King County refused to grant Plaintiffs' preliminary plat application because of the inadequate access to the plat.[4] The County's concerns about access were not "clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals, or general welfare." Sinaloa Lake, 882 F.2d 1407. Thus, the Court

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[4] Plaintiffs allege that the County inappropriately relied on its unwritten "100-lot limit" in denying Plaintiffs' preliminary plat application. The Zoning and Subdivision Examiner's Revised Report and Recommendation contradicts Plaintiffs' contention. See Finding No. 8, Exhibit 4 to Macri Declaration ("In view of the absence of an adopted regulation ..., King County cannot apply [the 100-lot limit], or any other, specific limit ..."). At any rate, whether the County's alleged reliance on its unwritten policy violated existing state law is a different issue than whether the County's actions violated federal substantive due process.

HOLDS as a matter of law that Plaintiffs in this case cannot demonstrate a violation of federal substantive due process, and the Court GRANTS summary judgment in favor of Defendant on Plaintiffs' § 1983 claim to the extent it is based on substantive due process.

C. Takings/Inverse Condemnation

The Court does not have jurisdiction over claims that are not ripe. Austin v. City & County of Honolulu, 840 F.2d 678, 682 (9th Cir.), cert. denied, 488 U.S. 852 (1988). A federal takings claim is not ripe until the property owner has sought and been denied "compensation through state procedures, including an inverse condemnation action in state court, provided those procedures are adequate." Id. at 680. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, 105 S. Ct. 3108, 87 L. Ed. 2d 126, 143 (1985). Thus, no federal constitutional violation occurs until the state denies just compensation. Sinaloa Lake, 882 F.2d at 1402; see also Bateson v. Geisse, 857 F.2d 1300, 1306 (9th Cir. 1988) Picard v. Bay Area Regional Transit Dist., 823 F. Supp. 1519, 1522-23 (N.D. Cal. 1993). Here, because Defendant removed the action to federal court, Plaintiffs have not yet pursued relief in the state courts, and the Court lacks subject matter jurisdiction over Plaintiffs' federal takings claim. See Picard, 823 F. Supp. at 1523. The Court therefore DISMISSES Plaintiffs' federal takings claim pursuant to Fed R. Civ. P. 12(h) (3).[5]

[5] Neither party raised the issue of ripeness with regard to Plaintiffs' federal takings claim; however, because ripeness is a matter of jurisdiction, the Court sua sponte has addressed the issue.

As to Plaintiffs' state inverse condemnation claim, the Court must decide whether to exercise supplemental (pendent) jurisdiction over that claim.[6] Supplemental jurisdiction exists when the state claims "are so related to claims in the action within [the Court's] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). The Court may decline to exercise supplemental jurisdiction over a state claim if the Court has dismissed all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c) (3). Here, the Court has granted summary judgment against Plaintiffs on their federal substantive due process claim, has denied Plaintiffs' motion to amend the complaint to add a federal equal protection claim, and has dismissed Plaintiffs' federal takings claim as not ripe for review. Thus, no claims remain in this action over which the Court has original jurisdiction and the Court declines to exercise supplemental jurisdiction over Plaintiffs' state inverse condemnation claim.[7] The Court therefore REMANDS this case to the state court for further proceedings. 28 U.S.C. § 1447(c).

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[6] The Ninth Circuit's holdings in Austin and Bateson imply that the landowner must initiate and prosecute a state inverse condemnation action in state court. See Austin, 840 F.2d at 680; Bateson, 857 F.2d at 1306. These cases appear to preclude a federal court from asserting pendent jurisdiction over a state inverse condemnation claim; however in Sinaloa Lake, the Ninth Circuit indicated in a footnote that, in the interest of judicial economy, a federal court could assert supplemental jurisdiction over a state law taking claim. Sinaloa Lake, 882 F.2d at 1404 n.4. In Picard, the District Court decided to exercise supplemental jurisdiction over the state law taking claim at issue, citing both Sinaloa Lake and 28 U.S.C. § 1367, which took effect on December 1, 1990, after the Ninth Circuit issued its opinion in Sinaloa Lake. Picard, 823 F. Supp. at 1526-28. Thus, the Court does not read Austin and Bateson as precluding a federal court from hearing a state inverse condemnation claim.

[7] The parties have presented numerous arguments to the Court with regard to Plaintiffs' takings claims. As the Court declines to assert supplemental jurisdiction, the Court does not reach the merits of Plaintiffs' claims.

IT IS SO ORDERED.

The Clerk of the Court is directed to send uncertified copies of this order to all counsel of record.

Dated this 5th day of June, 1995.

/s/ Thomas S. Zilly
THOMAS S. ZILLY
UNITED STATE DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI; AND ELEANOR MACRI,

Plaintiffs-Appellants

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Appellee.

_____/

No. C94-305Z

MINUTE ORDER

(Filed July 29, 1994)

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U.S. District Judge:

(1) Defendant's motion to dismiss plaintiffs' claim under RCW 64.40, docket no. 12 at page 22, is GRANTED. Plaintiffs' claim must be dismissed for failure to comply with the applicable statute of limitations contained in RCW 64.40.030. R/L Associates v. Seattle, 73 Wn. App. 390 (1994).

(2) Plaintiffs' motion for summary judgment, docket no. 10, is DENIED. The Court concludes that the doctrine of collateral estoppel does not apply in this case. A finding of "arbitrary and capricious" under RCW 64.40.020 does not establish liability under 42 USC § 1983. This issue

will be controlled by federal rather than state law. Missouri v. Hunger, 459 U.S. 359, 368, 74 L.Ed.2d 535 (1983). The Ninth Circuit has established demanding standards for determining whether a zoning ordinance has failed to comport with substantive due process. Southern Pacific v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990). See also Harding v. County of Door, 870 F.2d 430 (7th Cir. 1989). There are material issues of fact which preclude summary judgment on plaintiffs' Section 1983 claims.

(3) The parties are directed to show cause, within ten (10) days, why plaintiffs' third cause of action for inverse condemnation should not be remanded to state court pursuant to Bateson v. Geisse, 857 F.2d 1300, 1305-1306 (9th Cir. 1988).

(4) The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 29th day of July, 1994.

BRUCE RIFKIN, Clerk

By /s/
Casey Condon
Deputy Clerk

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JOE A. and LOUISE MACRI and JOE F. and ELEANOR MACRI, SR.,

Plaintiffs,

vs.

KING COUNTY, a political subdivision of the State of Washington and the KING COUNTY COUNCIL,

Defendants..

No. 92-2-04442-1

ORDER ON REVIEW

(Filed January 7, 1994)

_____/

The return of plaintiffs' writ of review was assigned to the undersigned for hearing and disposition. Richard B. Sanders and Eric Stahlfield represented the plaintiff whereas King County Prosecuting Attorney through Kevin Wright represented the defendants. This court considered the following:

1. Return to Writ of Certiorari comprised of various documents and exhibits forming a portion of the record of this case.

2. A Verbatim Transcript of proceedings had in this matter before the Hearing Examiner and the King County Council.

3. Plaintiffs' Brief and Amended Plaintiffs' Brief.

4. Defendant's Brief and Corrected Defendant's Brief.

5. Plaintiffs' Reply Brief.

This court heard oral argument on December 28, 1993 at which time both parties referenced County action on the Zimmer Short Plat, a parcel of property in the vicinity of the subject property. The court considered and granted over objection plaintiffs' motion to file a post-hearing supplement to the record regarding the Zimmer Short Plat; however this court concludes plaintiff is entitled to the relief afforded by this order without reference to the Zimmer Short Plat.

Based upon a thorough review of the record properly before it this court summarizes its conclusions and findings as follows:

1. Jurisdiction on Review. This matter comes before the court on a writ to review Ordinance No. 10252 adopted by the King County Council on January 27, 1992 which denied the Preliminary Plat of El Cove designated by Building and Land Development Division File No. S90P0025.

2. Standard of Review. This court reviews the action of the King County Council pursuant to RCW 58.17.180 to determine whether the decision disapproving the plat was unlawful, arbitrary, capricious and applies the lawfully required standard of review to the action of the King

County Council which incorporated Findings and Conclusions contained in the revised report of the Zoning and Hearing Examiner dated November 22, 1991.

3. Nature of Proposed Plat. Plaintiffs Macri submitted a complete application to subdivide the subject property into 12 residential lots by filing same with King County in 1990 and paying all requisite fees. Thereafter the proposal was revised in minor respects to reduce the number of proposed lots from 12 to 11 and in other minor respects which are not here material. The subject property is comprised of approximately 3.1 acres and is located and generally between S.E. 262nd St. and S.E. 260th St. (if extended) and generally between 200th Ave. S.E. and 201st Ave. S.E. (if both road were extended) east of Kent in unincorporated King County. Macri proposed that the parcel be subdivided as single family residential building lots in a manner consistent with all applicable King County Code requirements.

4. Street Access. The 200th Ave. S.E. corridor provides adequate access to El Cove. Said corridor is identified by County Road Standards as a neighborhood collector designed to service over 50 single family dwelling units. This corridor has ample capacity to provide vehicular access to El Cove.

5. Hundred Lot Rule of Thumb. In 1992, subsequent to all relevant proceedings herein, the King County Council adopted Ordinance 10435 providing "no residential neighborhood collector street shall serve more than 100 lots or dwelling units unless said residential neighborhood collector street is connected in at least two locations with another public roadway that functions at a level consistent with Chapter 2.03." That ordinance, however, does not apply to this proposal to subdivide El Cove by the plaintiff which was filed substantially before its

enactment. However the court finds that the County essentially denied the El Cove plat application through a retroactive application of this ordinance which at all times material to these proceedings was no more than an informal unwritten "rule of thumb" not adopted by ordinance, resolution, formally adopted policy, or comprehensive plan provision.

6. Determination of Nonsignificance. This plat was subject to environmental review under the State Environmental Policy Act. King County determined on September 18, 1990 that same does not have a probable significant adverse impact on the environment and published a final threshold determination on or about that date to that effect which was not subject to subsequent review.

7. Plat Complies with all Legal Standards. El Cove Plat complies with all applicable legal standards lawfully imposed by King County and/or the State of Washington. This court does not construe the face of the findings adopted by the King County Council to the contrary and finds no requisite support in the record to justify a factual finding that the El Cove Plat does not comply with all objective legal standards.

8. Rule of Thumb does not have Force of Law. The so-called 100 lot limit rule of thumb does not have the force of law nor has it been consistently applied.

9. 100 Lot Rule of Thumb Arbitrary on Face and as Applied. The 100 lot rule of thumb was arbitrarily and irrationally applied to justify denial of the El Cove subdivision. The rule of thumb was arbitrary and irrational on its face and as applied. Application of the rule of thumb to this project was in disregard of the facts and circumstances of this proposal and not supported by requisite factual findings nor evidence in the record.

10. Lack of Nexus. Denial of the El Cove Plat because it is accessed by a dead-end street bears no reasonable much less substantial relationship to the attributes or consequences of this proposed subdivision which are themselves insignificant. However denial of the plat on this basis would shift the entire public responsibility to provide connecting roads disproportionately to the shoulders of a small land owner who did not create the alleged problem, did not substantially contribute to the alleged problem, and therefore cannot be required to cure the alleged problem as a condition precedent to the development of his property. This court concludes that such condition or denial takes the owner's property contrary to Constitution Article I, § 16 and the United State Constitution Amendments Fourteen and Five.

11. Unduly Oppressive. This court concludes that denial of the proposal under the circumstances of this case is unduly oppressive to the land owner, is arbitrary, irrational, and deprives the owner of his property absent that lawful process due under the Fourteenth Amendment to the United States Constitution. It is reversible error under the statutory standard of review.

WHEREFORE this court does now ORDER, ADJUDGE AND DECREE as follows:

King County Ordinance 10252 denying the El Cove Plat should be and hereby is reversed because same is unlawful, arbitrary, capricious, deprives the owner property without due process, takes the owner's property without compensation and without legitimate public purpose. This matter is remanded to the King County Council with instructions to grant the preliminary approval of the plat conditioned only as set forth in the Revised Report and Recommendation to the King County Council of the Hearing

Examiner dated November 22, 1991, pp. 8-11. Plaintiff is awarded his statutory costs in an amount to be taxed according to law.

DONE IN OPEN COURT this 7 day of January, 1994.

/s/
JUDGE

Presented By:

/s/ Richard B. Sanders
RICHARD B. SANDERS, WSBA # 2813
Attorneys for Plaintiffs

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI; AND ELEANOR MACRI,

Plaintiffs-Appellants

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Appellee.

/

No. 95-35709
D.C. No.
CV 94-305-TSZ

ORDER

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted August 9, 1996.

Decided April 21, 1997.
Amended September 17, 1997.

Appeal from the United States District Court for the Western District of Washington, Thomas S. Zilly, District Judge, Presiding. D.C. CV 94-305-TSZ.

Before: BEEZER and O'SCANNLAIN, Circuit Judges, and BROWNING, District Judge. [1]

ORDER

[1] The Honorable William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

The Opinion filed on April 21, 1997, is amended as follows:

1. On slip opinion, page 4628, line 23, replace "and" with "or."

2. On slip opinion, page 4630, line 20 replace all text beginning with "Appellants argue" and ending with "R/L Associates" on page 4631, line 18, with the following:

> However, while the Council's action would have been the final administrative remedy if Appellants had done nothing, Appellants brought an action in King County Superior Court on February 26, 1992, specifically for the purpose of overturning what Appellants claimed was arbitrary and capricious action by the Council. The superior court ruled in Appellants' favor on January 7, 1994, and ordered the County to approve the application. Appellants are correct that, under these facts, there administrative remedies were not exhausted until February 28, 1994, when, pursuant to the superior court's order on Appellant's writ of certiorari, the County Council finally approved the preliminary plat application. *See Hayes v. City of Seattle*, 131 Wash. 2d 706, 934 P.2d 1179, 1183-84 (1997). However, Appellants filed their claim for damages under Wash. Rev. Code § 64.40 on February 4, 1994, more than three weeks *before* the County Council finally approved the preliminary plat application. Appellants claim was therefore unripe under the plain language of § 64.40.030, which explicitly

states that actions must be "commenced only within thirty days *after* all administrative remedies have been exhausted." Wash. Rev. Code § 64.40.030 (emphasis added). This conclusion is supported by the decision of the Washington Supreme Court in *Hayes*, which noted that "final action on [applicant's] request for a permit did not occur until the City Council ultimately approved his application [following judicial review of the Council's initial determination] ...." *Hayes*, 934 P.2d at 1184. Consequently, Appellants' claim under § 64.40 was properly dismissed by the district court as untimely, not for the reason that it exceeded the limitations period, however, but because it was unripe.

3. On slip opinion, page 4631, line 29, replace "limitations reasons" with "the reason that Appellants' claim was untimely."

With these amendments, the panel has voted to deny Appellants' petition for rehearing. Judge O'Scannlain has voted to reject the suggestion for rehearing en banc and Judge Beezer and Judge Browning so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.